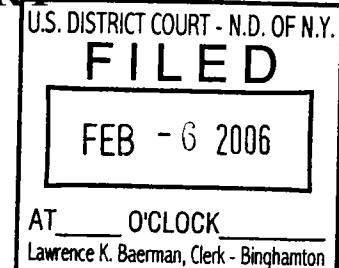

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ALEXANDER TUPAZ and
LOURDES TUPAZ,

Plaintiffs,

ORDER



CLINTON COUNTY, NEW YORK,
and JANET DUPREY, in her Individual
Capacity and in her Official
Capacity as Clinton County Treasurer,

Docket No.: 1:05-CV-606

Defendants.

By Notice of Motion dated September 20, 2005, the Defendants moved for an Order pursuant to Federal Rules of Civil Procedure §12(b)(c) and §56(b) dismissing the complaint and granting summary judgment in favor of the defendants. By Notice of Cross-Motion dated December 12, 2005, the Plaintiffs cross-moved for partial summary judgment in their favor.

The Court has reviewed and considered the Affidavit of Robert A. Rausch, Esq., sworn to December 20, 2005 and the exhibits annexed thereto, the Affidavit of Janet Duprey sworn September 19, 2005, the Memorandum of Law dated September 20, 2005, and the Defendants' Statement of Undisputed Facts; the Affidavit of Mark Schneider, Esq., sworn to December 12, 2005, and the exhibits attached thereto, the Plaintiffs' Brief dated December 12, 2005, the Plaintiffs' Statement of Material Facts and the Plaintiffs' Response to Defendants' Statement of Material Facts; the Reply Affidavit of Robert A. Rausch, Esq., sworn to December 21, 2005, and the exhibits attached thereto, the Reply Memorandum of Law dated December 21, 2005, the

Defendants' Response to Plaintiffs' Statement of Material Facts; and the Plaintiffs' Reply Brief dated December 26, 2005, and the exhibits attached thereto.

In addition, on January 9, 2006, the Court heard oral argument from Robert A. Rausch, Esq., counsel for Defendants, and Mark Schneider, Esq., counsel for Plaintiffs.

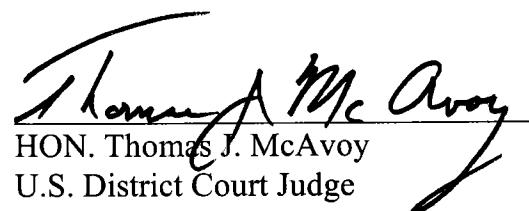
NOW, upon due deliberation, it is hereby

ORDERED, that the Court lacks subject matter jurisdiction over this matter, and it is further

ORDERED, that for the reasons set forth in full in the transcript of this Court's determination, a copy of which is attached hereto and incorporated into this Order, the motion of the Defendants is hereby granted, that the Defendants shall be granted summary judgment in their favor, and that the Plaintiffs' complaint in the above-captioned matter shall be dismissed with prejudice and in its entirety, and it is further

ORDERED, that the Plaintiffs' cross-motion for partial summary judgment shall be denied in its entirety.

DATED: February 4, 2006
at _____, New York


HON. Thomas J. McAvoy
U.S. District Court Judge

COPY

1
2 UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF NEW YORK

4 -----

5 ALEXANDER TUPAZ and LOURDES TUPAZ

6

7 Plaintiffs,

8 -versus- 05-CV-606

9 (DECISION)

10 CLINTON COUNTY, NEW YORK, and

11 JANET DUPREY, in her individual capacity

12 and in her official capacity as Clinton

13 County Treasurer,

14 Defendants.

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17 TRANSCRIPT OF PROCEEDINGS held in and for

18 the United States District Court, Northern District of

19 New York, at the James T. Foley United States Courthouse,

20 445 Broadway, Albany, New York 12207, on MONDAY,

21 JANUARY 9, 2006, before the HON. THOMAS J. McAVOY,

22 United States District Court Judge.

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BONNIE J. BUCKLEY, RPR

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1 (Bench decision rendered as follows):

2 THE COURT: Plaintiffs commenced the instant
3 property action pursuant to 42 U.S. Code Section 1983
4 claiming that they've been deprived of their real property
5 without due process of law in violation of the Fourteenth
6 Amendment and that New York Real Property Law Section 1125
7 and 1131 are unconstitutional. The basic facts are as
8 follows.

9 Plaintiff owned certain real property in
10 Clinton County. The county claims to have mailed several
11 notices to plaintiffs indicating that back taxes were due
12 and owing and that the property would be foreclosed if the
13 taxes are were not paid. Plaintiffs do not recall receiving
14 any of these letters. On October 10, 2003, the county sent
15 a notice and petition of foreclosure to plaintiff via
16 certified mail. The post office indicated that the notice
17 and petition of foreclosure was delivered to plaintiffs on
18 October 16, 2003. Plaintiffs, on the other hand, contend
19 that they never received the notice and that there's no
20 signature on the PS Form 3811. There's a factual dispute
21 whether the making of the Form 3811 -- whether the marking
22 on the Form 3811 is a signature or a straight line. For
23 purposes of this motion, the Court will assume the marking
24 is not a signature. The county also published a notice of
25 foreclosure in a local newspaper once a week for three

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1 nonconsecutive weeks. The county ultimately commenced
2 foreclosure proceedings. A default judgment was entered in
3 favor of the county and title transferred to it. Plaintiffs
4 now contend that they were deprived of their property
5 without due process of law and that the notice requirements
6 under the New York State Real Property Law are
7 unconstitutional.

8 Although the parties briefed the substantive
9 merits of their respective cases, the Court is not prepared
10 to go that far. The Court must first address an issue not
11 raised by either party; that is, subject matter
12 jurisdiction. Courts have an obligation to determine
13 whether they have subject matter jurisdiction and, if
14 necessary, must do so sua sponte. Although both parties
15 apparently assume such jurisdiction to exist because this
16 matter has been brought pursuant to 42 U.S. Code Section
17 1983, they have not discussed the Tax Injunction Act and the
18 related principles of comity as applied to this case.

19 The Tax Injunction Act is expressly designed
20 to restrict the jurisdiction of district courts of the
21 United States over suits relating to the collection of state
22 taxes. Hibbs versus Winn, 542 U.S. 88, at 104, quoting
23 Senate Report Number 1035, 75th Congress, first session, at
24 page four. In this case, plaintiffs are challenging the
25 constitutionality of the actions taken by the county in

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1 collecting the property taxes. Specifically, plaintiff
2 claims -- plaintiffs claim that in collecting property taxes
3 and enforcing the tax foreclosure scheme, defendants failed
4 to give them constitutionally adequate notice. This
5 challenge is precisely the type of lawsuit prohibited by the
6 Tax Injunction Act and its related principle of comity. See
7 Sagliocco versus New York City Municipal Corporation, 1996
8 Westlaw 128243; MacNaughton versus Warren County, Number
9 03-CV-1467, affirmed, 123 Federal Appendix 425; see also
10 Baechle versus Town of Mendon, Vermont, 2005 Westlaw
11 3334708, at *4; Bernard versus Village of Spring Valley, 30
12 F.3d 294, at 297; Shulz versus Washington County Board of
13 Supervisors, 349 F.Supp.2d 375; Long Island Lighting versus
14 Town of Brookhaven, 889 F.2d 428.

15 By this lawsuit, plaintiffs are seeking to
16 preclude the county from collecting its taxes through the
17 foreclosure mechanism. See Andresakis versus State of
18 Connecticut, 122 F.3d 1055, 1997 Westlaw 383456 at *2. The
19 Tax Injunction Act applies to enforcement measures such as
20 foreclosures. See Sagliocco versus New York City
21 Municipal Corporation Department of Finance Bureau of Tax,
22 101 F.3d 108, 1996 Westlaw 128243 at *1; Keleher versus New
23 England Telephone and Telegraph Company, 947 F.2d 547;
24 abrogated on other grounds; Jefferson County, Alabama versus
25 Acker, 527 U.S. 423; Baechle, 2005 Westlaw 3334708 at *3 and

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1 4; Finizie versus City of Bridgeport, 880 F.Supp. 89, at 91.
2 Further, it matters not that plaintiff may only be
3 challenging the action of certain officials. The Second
4 Circuit has held that when the administration of a state tax
5 scheme is involved, even actions by state tax officials that
6 have been held in state court to contravene state laws are
7 not cognizable in federal court. Hoffer versus Ancel, 32
8 Federal Appendix 593, at 597, citing Bernard, 30 F.3d 294.

9 Because plaintiffs have a plain, speedy and
10 efficient remedy in the state courts, such as a Section 1983
11 claim in state court, Bernard, 30 F.3d at 297, due process
12 is available. Moreover, although the TIA mentions only
13 injunctions -- that's the Tax Injunction Act -- mentions
14 only injunctions, comity bars declaratory judgment and 42
15 U.S. Code Section 1983 damage actions as well. Fair
16 assessment in Real Estate Association versus McNary, 454
17 U.S. 100, at 105. Accordingly, the Court lacks jurisdiction
18 over the plaintiffs' claims.

19 This Court is aware that Akey versus Clinton
20 County, New York, 375 F.3d 231, a case involving the very
21 same attorneys as in this case, the Second Circuit addressed
22 the due process claims without addressing the Tax Injunction
23 Act. It is unknown why the Second Circuit did not address
24 the Tax Injunction Act. Upon review of the papers in that
25 case, however, it appears that the Tax Injunction Act was

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1 not brought to the attention of the Circuit and perhaps the
2 Circuit overlooked that jurisdictional issue.

3 The Court is also aware of Luessenhop versus
4 Clinton County, 378 F.Supp.2d 63, another case involving
5 these same lawyers where, again, the parties did not address
6 the issue of subject matter jurisdiction and it was not
7 addressed by Magistrate Judge Treece. That matter is now on
8 appeal to the Second Circuit. The Court in a telephone call
9 last week discussed with Magistrate Judge Treece the Court's
10 view of jurisdiction, and Magistrate Judge Treece indicated
11 that he would be in contact with the Second Circuit. It
12 would be prudent for the attorneys to raise the issue of
13 subject matter jurisdiction to the Second Circuit in that
14 case so that it can be properly addressed by the Circuit.

15 Now, even if the Court did have subject
16 matter jurisdiction, it would seem that most if not all of
17 plaintiffs' arguments are foreclosed by the state court
18 proceedings in which it was determined that plaintiffs
19 received proper notice notwithstanding the illegible mark on
20 the PS Form 3811. See In Re Foreclosure of Tax Liens by
21 County of Clinton, 17 Appellate Division 3d 914, Third
22 Department, 2005. Further, in light of the numerous first
23 class letters sent to plaintiffs' proper address regarding
24 their tax deficiencies and indicating that the failure to
25 pay taxes would result in foreclosure, none of which were

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1 returned as undeliverable, the notice of foreclosure that
2 was sent by certified mail to plaintiffs' proper address and
3 confirmed by the postal service to have been delivered, and
4 the publication in the local newspaper, plaintiffs were not
5 deprived of their property without due process of law. See
6 Weigner versus City of New York, 852 F.2d 646, Luessenhop
7 versus Clinton County, 378 F.Supp.2d 63.

8 Plaintiffs make much of the fact that the
9 postal receipt contains a straight line through it or some
10 otherwise unintelligible mark. The Court finds that fact to
11 be irrelevant. Although the state statute may require
12 service by certified mail, the Constitution does not. In
13 Weigner, the Second Circuit Court of Appeals held that first
14 class mail was constitutionally adequate and rejected a
15 requirement of using certified mail, return receipt
16 requested. If first class mail, attendant with its risk of
17 non-delivery, is adequate, then a certified letter that has
18 been confirmed by the postal service to have been delivered
19 to plaintiffs' proper address passes constitutional muster.
20 Thus, in this case, plaintiffs received adequate notice and
21 were afforded an opportunity to be heard.

22 For the foregoing reasons, the Court lacks
23 subject matter jurisdiction over this matter. Assuming the
24 Court does have jurisdiction, defendants are entitled to
25 summary judgment.

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1 Accordingly, if the Court has jurisdiction,
2 defendants' motion for summary judgment is granted,
3 plaintiffs' cross-motion for summary judgment is denied, and
4 the complaint is dismissed in its entirety. The defendants
5 should submit an appropriate order on notice to plaintiffs
6 within 11 days of today's date.

7 Thank you both for interesting arguments.
8 Court stands adjourned in this matter.

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